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Supreme Court, U.S.
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No. 96-388

In The

Supreme Court of the United States

October Term, 1996

HERMAN SKINNER,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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II.

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RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, Defendant/Appellant below, City of Miami, Florida, respectfully requests the Court to deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit filed by Petitioner, Plaintiff/Appellee below, Herman Skinner. In this Response in Opposition to Petition for Writ of Certiorari, the parties will be referred to by name or as they appeared before the District Court.

The instant case is not the civil counterpart of *United States v. Lanier*, 73 F. 3d 1380 (6th Cir.), *cert. granted*, ___ U.S. ___, 116 S.Ct. 2522, 135 L.Ed.2d 1047 (June 17, 1996) for reasons discussed *infra*. Rather, this case merely adhered to the well-established principle that claims for incidents between co-workers based on rights that are grounded on state law will not be elevated constitutional proportions.

STATEMENT IN OPPOSITION TO JURISDICTION

Section 1254(1) of Title 28 of United States Code provides that the Supreme Court may review cases in the courts of appeal by "writ of certiorari upon the petition of any party. . . . " However, it is respectfully submitted that the Court of Appeals' decision does not create inter-circuit conflict, conflict with relevant decisions of this Court, or decide an important question of federal law that has not been, but should be, settled by this Court. *See* Sup.Ct.R. 10(a), (c).

STATEMENT OF THE CASE

This litigation was filed as a result of a spontaneous incident that occurred at a City of Miami fire station and involved Plaintiff and five fellow firefighters. There is no dispute that this incident occurred and no one is happy about it. Four of the five firefighters were fired, the fifth one received a 480 hour suspension. In accordance with the provisions of their collective bargaining agreement, the firefighters grieved this discipline and were ultimately ordered back to work by the arbitrator.[1] As to the instant case, the City's liability has been hotly contested; it did not defend the individual firefighters, who ultimately settled with Plaintiff from their own resources before the case went to trial.

A. The Material Facts.

As the Court of Appeals recognized, the facts giving rise to the incident in question are not in dispute. The material facts surrounding this incident are set forth in the Court of Appeals' opinion, appended hereto at 1a-16a, and will not be reiterated here. While Plaintiff's statement of the case is generally accurate, the problem is more with what was not stated, as opposed to what was stated.

Plaintiff told the perpetrators later the night of the incident that they could lose their jobs and go to jail for

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[1] Under Florida law and the provisions of the collective bargaining agreement, the arbitrator's decision is final and binding except in very limited circumstances. *See* §§682.13 and 682.14, Fla. Stat. (1991).

what they had done to him. Three days later, when contacted by fire department officials about this incident, Plaintiff continued to recognize that the perpetrators could be fired because he lied to the investigators. He told them that it was an "unfounded rumor." After the interview, Plaintiff called one of the perpetrators to warn him that a fire department official was on his way to talk to him, and assured him that Plaintiff did not tell anything about the incident to the official. Plaintiff waited another three days before he changed his mind and recanted his earlier lie. An investigation immediately ensued.

Plaintiff and the five firefighters who perpetrated this incident were all members of the classified ranks in the Fire Department. Not one of the individuals that perpetrated this incident was clothed with real or pretended authority to engage in the complained of activity.

B. District Court Proceedings

Plaintiff filed this lawsuit against the City, the fire chief and the five perpetrators on January 23, 1990, less than two months after the incident. Throughout this litigation, Plaintiff's allegations regarding the actual constitutional violations he purportedly suffered have been nebulous. In the First Amended Complaint, the complaint upon which the case was tried, Plaintiff alleged that the district court's jurisdiction vested, *inter alia*, because the case was "brought pursuant to 42 U.S.C. §§1983 and 1988, and the Fourth, Fifth and Fourteenth Amendments of the United States Constitution." (R. 1 – 29 – 2). Plaintiff denominated Count I as "Deprivation of Liberty Without

Due Process of Law," but in that regard, merely alleged that

> Defendants' unconstitutional practices . . . deprived Plaintiff of his constitutional rights as secured by the Fourth, Fifth and Fourteenth Amendments . . . which: (a) prohibit the establishment and maintenance of a racially discriminatory and racially harassing working environment; (b) prohibit the use of excessive and unreasonable force; (c) prohibit the deprivation of liberty without due process of law; and (d) provide freedom from summary punishment. (R. 1 – 29 – 7-8).[2]

In Count II, entitled "False Imprisonment," Plaintiff asserted that "Defendants used excessive and unreasonable force . . . and confined him by the use of handcuffs against his will and in violation of applicable State and Federal laws." (R. 1 – 29 – 8). Counts III and IV purported to state claims for "Sexual Battery" and "Intentional Infliction of Emotional Distress," respectively. (R. 1 – 29 – 8-9).

In a unilateral pretrial stipulation filed in 1991, Plaintiff asserted the following as "Issues of Law and Fact for Determination at Trial" in regard to the purported constitutional violations:

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[2] During the charge conference, defense counsel successfully argued that there was no constitutional provision that gives a right to be free from harassment. (R. 8 – 301-306). In regard to the racial allegations, Plaintiff conceded in both his deposition and at trial that the incident was not racially motivated. (R. 2 – 144 – 5; 6 – 116).

> 5. Whether the Defendants deprived Skinner of liberty without due process of law in violation of his rights under the Fifth and Fourteenth Amendments. . . .
>
> 6. Whether the Defendants falsely imprisoned Skinner . . . and confined him by the use of handcuffs in violation of applicable state and federal laws.
>
> * * *
>
> 9. Whether the Defendants . . . subjected the Plaintiff to deprivations of the following clearly established and well settled constitutional rights:
>
> a. Freedom from the excessive and unreasonable use of force;
>
> b. Freedom from the deprivation of liberty without due process of law; and
>
> c. Freedom from summary punishment.

(R. 2 – 123 – 4-5).

In a Joint Pretrial Stipulation filed in 1992, the parties included the following as an issue of ***law*** to be resolved by the Court: "[w]hether the alleged false imprisonment constitutes a "seizure" within the meaning of the Fourth Amendment, and if so whether that "seizure" was caused by a policy, practice on [sic] custom of the City of Miami." (R. 2 – 141 – 9).

The case proceeded to trial against the City and the fire chief, the sole remaining Defendants. Plaintiff admitted at trial that the five perpetrators were acting "outside

their authority" when they wrestled him to the floor and assaulted him.

Although the charge conference went on for several pages as to how the jury should be instructed in regard to the constitutional violation element of liability, Plaintiff only set forth a few lines from the entire colloquy. Petition at 3. A copy of this portion of the charge conference, which appears in the record in volume 8, document 220, pages 301 to 307, is attached hereto in the appendix [17a – 23a] for the Court's convenience. The Court is requested to review the colloquy in its entirety.

At the close of Plaintiff's case, the district court directed a verdict for the fire chief in both his individual and official capacities. The District Court denied the City's renewed motion to direct a verdict at the close of all the evidence; the jury returned a verdict against the City in the amount of $1.3 million. The district court denied the City's post-trial motions.

C. Eleventh Circuit Proceedings.

The question of whether Plaintiff did in fact suffer a constitutional deprivation at all was raised by the Court of Appeals during oral argument. The Court of Appeals allowed the parties to file post oral argument supplemental briefs. The Court of Appeals issued its opinion wherein it addressed only the constitutional question and not any of the other issues. Plaintiff filed a suggestion of rehearing en banc and the City responded thereto. Thereafter, the Court of Appeals denied the suggestion and Plaintiff filed the instant Petition.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PLAINTIFF DID NOT SUFFER A CONSTITUTIONAL DEPRIVATION AND THAT THE CITY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The City does not quibble with Plaintiff's presentation of the law set forth in his Petition in regard to constitutionally afforded protections. However, as the Court of Appeals correctly discerned, those protections are not implicated under the circumstances of the instant case. What transpired at the fire station was nothing more than an immature, irresponsible, and distasteful incident that, at most, culminated in a state law tort.

A. Expansion of Substantive Due Process to Protect Against Horseplay By Immature, Irresponsible, and Inconsiderate Co-Workers is not Warranted.

The Fourteenth Amendment Due Process Clause does not require "the State to protect the life, liberty, and property of its citizens against invasion by private actors," or guarantee certain minimal levels of safety and security. *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 195 (1989). Rather, the Due Process Clause "is phrased as a limitation on the State's power to act." *Id.*

The substantive component of the Fourteenth Amendment Due Process Clause protects fundamental rights, that is, those rights that are "implicit in the concept of ordered liberty," as well as individual liberty

against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The substantive element does not "purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. at 332 (1986).

"The history of substantive due process 'counsels caution and restraint.' " *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, concurring) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977). For the most part, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

The doctrine of self restraint requires the Court to exercise the utmost care whenever it "is asked to break new ground" in substantive due process jurisprudence. *Id.* The Court adhered to this doctrine when it expressly rejected contentions that the substantive component of the Due Process Clause guarantees employees a safe and secure workplace or that it guarantees against incorrect or ill-advised personnel decisions. *See Collins*, 503 U.S. at 115; *Bishop v. Wood*, 426 U.S. 341 (1976).

Application of these polestar principles to the Petition filed in this case commands that the Court again

exercise the doctrine of self restraint. There is no constitutional implication to justify review.[3] By virtue of this lawsuit, Plaintiff attempts to transform an incident of horseplay perpetrated by immature, irresponsible and inconsiderate co-workers into a constitutional event. Imagine if every assault, battery, rape, or other physical touching, which heretofore was grounded in state law, is afforded substantive due process protection and therefore subject to redress under 42 U.S.C. §1983.

The Court of Appeals appropriately stifled Plaintiff's quest to break new ground in substantive due process jurisprudence because there are no guideposts for responsible decisionmaking. It ordered that the judgment be entered for the City as a matter of law based upon its astute recognition that all Plaintiff had proven was that he was assaulted, which "is a tort created by state law." *Skinner v. City of Miami*, 62 F. 3d 344, 347 (11th Cir. 1995).

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[3] Plaintiff asserts that the Court of Appeals' "decision creates explicit inter-circuit conflict with *McWilliams v. Fairfax County Board of Supervisors*, 72 F. 3d 1191 (4th Cir. 1996). . . . " Petition at 10. At the time that the Petition was filed, a Petition for Writ of Certiorari was pending (No. 95-1389). On October 7, 1996, the Court denied review. 65 USLW 3240, 65 USLW 3257, 117 S. Ct. 72 (Mem). Although that case involved both Title VII and a §1983 claim, the Court of Appeals cited one of its earlier cases that dealt with unreasonable paddling of a public school student by a school official for the proposition that the substantive element of Due Process protects against "unreasonable bodily intrusions by state-actors" to summarily conclude that the physical assaults against the plaintiff "would, if proven, constitute the infliction of a constitutional injury." 72 F. 3d at 1197.

The Court of Appeals was absolutely correct. Plaintiff's substantive rights are grounded in Florida's tort law. That is, under Florida law, the incident of horseplay perpetrated by Plaintiff's fellow firefighters was a battery, that is, a harmful or offensive contact, and an invasion of his privacy rights. *See Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992); *Chorak v. Naughton*, 409 So. 2d 35 (Fla. 2d DCA 1981). Battery and invasion of the right of privacy are actionable torts under Florida law. *See Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F. 2d 9 (5th Cir. 1962); *Chorak, supra; Kaczer v. Marrero*, 324 So. 2d 717 (Fla. 3d DCA 1976); *Tucker v. American Emp. Ins. Co.*, 171 So. 2d 437 (Fla. 2d DCA 1965). In fact, it is entirely possible that Plaintiff could bring a state law claim against his fellow firefighters for intentional infliction of emotional distress. *See Stockett*, 791 F. Supp. at 1556. Accordingly, the Court of Appeals judiciously declined the invitation to make a federal case out of substantive rights that are grounded in Florida's tort law.

B. Liberty Interest in Bodily Integrity is not Implicated.

The critical distinction between those cases cited by Plaintiff to suggest that his liberty interest in bodily integrity has been violated and the instant case is that the alleged wrong was committed by a state-actor. The person who perpetrated the alleged wrong did so under the auspices of color of law, that is, through the exercise of ostensible power or authority by virtue of said person's position. *See, e.g., Canedy v. Boardman*, 16 F. 3d 183 (female

prison guards observing male prisoners naked and conducting strip searches); *Doe v. Taylor Independent School Dist.*, 15 F. 3d 443 (5th Cir. 1994) (public school teacher accused of statutory rape and sexually fondling 15 yr. old student); *United States v. Tarpley*, 945 F. 2d 806 (5th Cir. 1991) (during assault of wife's lover, police officer claimed to have special authority for his actions by virtue of his official status); *Vang v. Toyed*, 944 F. 2d 476 (refugee plaintiffs raped by state employee responsible for interviewing and finding refugees suitable employment); *Stoneking v. Bradford Area School Dist.*, 882 F. 2d 720 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) (public school band director used physical force, threats of reprisal, intimidation and coercion to sexually abuse, harass, and force student to engage in various sexual acts); *Hall v. Tawney*, 621 F. 2d 607 (4th Cir. 1980) (teacher paddled student).[4]

In contrast, the firefighters involved in this incident were not empowered or in any way authorized as part of their firefighting duties to engage in the activity that took place. The nature of the acts committed by the firefighters had absolutely no relation to their real or pretended

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[4] Similarly, in *McDowell v. Manchester Fire Dept.*, 769 F. Supp. 40 (D. N.H. 1990), cited by Plaintiff as being in accord with *McWilliams v. Fairfax County Board of Supervisors*, 72 F. 3d at 1191, the district court concluded that the fire captain was acting under color of law when he ordered a firefighter into his office and provoked a fight. That scenario is readily distinguishable from the instant case because the captain was authorized to order subordinates into his office. The firefighters herein were in no way authorized to wrestle, handcuff, and assault a fellow firefighter.

authority as City firefighters.[5] Plaintiff's own trial testimony established that on the very night of the incident, he told the firefighters that "[y]ou guys can go to jail for what you just did and you can lose your jobs." (R. 6 – 97). Plaintiff also testified that he knew that his fellow firefighters did not have the authority to commit the wrongdoing. (R. 6 – 91-92).

Absent a custodial situation or where one is involuntarily committed to an institution, the Due Process Clause does not protect a citizen from violence at the hands of non-government or third-party actors. *See, e.g., Lovins v. Lee,* 53 F. 3d 1208 (11th Cir. 1995) (no constitutional violation where woman was kidnapped and brutally raped by prisoner who had been temporarily released on a pass); *Wooten v. Campbell,* 49 F. 3d 696 (11th Cir.), *cert. denied,* 116 S.Ct. 379, 133 L.Ed.2d 302 (1995) (no constitutional violation where father abducted and killed son during an unsupervised visitation, even though son was in agencies' legal custody at time of incident); *Walton v. Alexander,* 44 F. 3d 1297 (5th Cir. 1995) (no constitutional

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[5] In the Court of Appeals, Plaintiff argued in his supplemental brief that his "commanding officer" committed the assault. One of the five firefighters was the "acting commanding officer" in the particular firestation when the incident occurred. There was no evidence whatsoever that the "acting commanding officer" was a final policymaker for the City so as to subject it for liability under §1983. Rather, this "acting commanding officer" was merely a firefighter in the classified ranks of the Fire Department with no policymaking authority whatsoever, and with not even the semblance of official authority to direct subordinates to engage in the activity that is the subject of this lawsuit.

violation where student attending a residential state institution for the deaf was twice sexually molested by a fellow classmate); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F. 2d 1364 (3rd Cir. 1992) (no constitutional violation when male students physically, verbally, and sexually molested two female students).

In *D.R. v. Middle Bucks Area Vocational Technical School*, 72 F. 3d at 1364, two female students in a graphics arts class filed suit under 42 U.S.C. §1983 against, *inter alia*, various teachers and school officials. The Court of Appeals rejected the female students' contention that they fell within the umbrage of a custodial situation by virtue of having to attend school and found that the female students' freedom was not so restricted so as to prevent them from meeting their basic needs, and the school did not deny them meaningful access to sources of help. *See also J.O. v. Alton Community Unit School Dist.*, 909 F. 2d 267, 272 (7th Cir. 1990) (school boards have not rendered schoolchildren so helpless that an affirmative constitutional duty to protect arises). This analysis provides an excellent framework to reject any suggestion that a custodial situation is present herein because firefighters are required to "live" at the fire station during their hours on duty.

What happened in this case is an aberration.[6] Under these circumstances, the firefighters are third-party, non-

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[6] The bizarre nature of this incident is exemplified by the testimony of one of the firefighters at trial. The firefighter testified that he did not engage in this activity pursuant to a policy or direction of the City. Rather, he "did it out of camaraderie" as something he "would do to a friend."

government actors. Employers have little control over what employees chose to do behind closed doors or out of the watchful eye of superiors. The Constitution cannot be used to punish an employer for its employees' failure to acquire during childhood basic notions of common decency, consideration, and morality.

C. No Fourth Amendment Seizure.

Plaintiff's suggestion in his questions presented for review that the Court of Appeals erred in determining that his counsel abandoned his Fourth Amendment claim at oral argument is quizzical. A violation of a constitutional right is an essential element that must be found in order for there to be liability under §1983. Counsel for Plaintiff that argued the case before the Court of Appeals has been counsel of record since the inception of this lawsuit, which was filed only weeks after the incident occurred.[7] That Plaintiff's counsel would not "know" or "be prepared" to respond to a simple question regarding a fundamental element of his case, stipulated to or not, raised in the briefs or not, is absolutely incredible.

Two days after oral argument before the Court of Appeals, Plaintiff filed a "Post Argument Memorandum of Law" which the Court of Appeals ultimately treated as a supplemental brief. With the exception of one bald reference to the Fourth Amendment, Plaintiff submitted a

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[7] Plaintiff's counsel of record in the instant proceeding was not counsel of record before either the Court of Appeals or the district court.

supplemental brief limited to substantive due process.[8] This is consistent with Plaintiff's counsel's candid and correct admission at oral argument that there was no Fourth Amendment violation in this case.

Although the Fourth Amendment is not limited solely to criminal cases, the Fourth Amendment is not implicated under the circumstances of this case. As explained above, the conduct complained of did not occur under color of law or with state action attendant to the activity alleged to be violative of the Fourth Amendment. The conduct of Plaintiff's co-workers was in no way related to the duties of firefighters. A contrary holding would transform every assault, battery, rape, or other touching into an unconstitutional seizure. Surely the framers of the Constitution did not intend such a sweeping result.

D. *Lanier* Distinguished.

The instant case does not present the "civil analogue of the question presented in *Lanier*," as posited by Plaintiff. Petition at 10. The *Lanier* case involved a state Chancery Court judge who committed abhorrent and unlawful sexual acts in his chambers, frequently while he was wearing his judicial robe. The judge was indicted in

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[8] In the opening paragraph, Plaintiff stated that he "alleged the following constitutional violations under the Fourth, Fifth and Fourteenth Amendments . . . the use of excessive and unreasonable force, the deprivation of liberty without due process of law and summary punishment."

eleven counts under 18 U.S.C §242:[9] three felonies, eight misdemeanors.

Three of the victims worked for the judge and were in chambers when the incidents occurred. One of the victims was a Youth Service Officer, and during the course of an interview, the judge told her that he had sole hiring authority for the Youth Service Officer position. During the course of one of their weekly meetings, which occurred in chambers, the judge sat beside the victim and, in the midst of conversation, grabbed and squeezed her breast. After the victim confronted the judge about his actions, he complained about the quality of the victim's work and took supervisory authority away from her.

A recently divorced woman with two young children was another of the judge's victims. Having gone to work for the judge as his secretary, she understood that the judge was her supervisor and had the power to fire her. The judge touched, grabbed, and squeezed the victim, and continued to become more aggressive. He told her she could do anything she wanted if she slept with him. Although she ultimately quit, she endured the harassment and assaults for a period of time because she needed the job.

The judge presided over another victim's divorce proceeding and awarded custody of the child to the

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[9] 18 U.S.C. §242 provides in pertinent part that "[w]hoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . or imprisoned. . . . "

victim. A couple of years later, the victim needed a job, and she filled out an application for a secretarial position at the courthouse. When the victim met with the judge in his chambers, he told her that her ex-husband had come to see him that day, the ex-husband complained that the victim was not a good mother, and that the ex-husband wanted custody of the child. Thereafter, he forced oral sex on the victim, and again on another occasion. The victim testified that she did not report either of the assaults because her child custody case had been before the judge, and she was afraid he would take her daughter away from her.

A jury rendered guilty verdicts as to two of the three felony counts and five of the eight misdemeanor counts. The Sixth Circuit reversed the convictions in a split *en banc* opinion. The majority found that Section 242 was "the most ambiguous of federal criminal statutes" in that it failed to provide notice to the public that "simple or sexual assault crimes" fell within its coverage. 73 F. 3d at 1384, 1394. The court observed that although the right not to be assaulted is a clear right under state law known to every reasonable person, "it is not publicly known or understood that this right rises to the level of a 'constitutional right.' " *Id.* at 1392.

A sampling of the incidents described above demonstrate that the defendant judge in *Lanier* abused his power and position under color of law to sexually assault and harass state judicial employees and litigants. The victims were intimidated by the judge's ostensible power to hire and/or fire them, or to control the outcome of litigation before him.

In contrast, the firefighters involved in the instant case did not abuse their power and position in order to perpetrate the incident herein. They did not use their position as a rank and file firefighter to threaten, intimidate, or coerce Plaintiff into doing what they wanted. Accordingly, there is absolutely nothing about the instant case that would render it "complimentary" to, or otherwise enhance, the Court's review of that horrendous case.

II.

THE COURT OF APPEALS IS NOT BOUND BY AN ERRONEOUS "STIPULATION" ON A PURE QUESTION OF LAW.

Legion are the cases where this Court and other Courts of Appeal have exercised their discretion and considered a legal issue or theory for the first time on appeal because the new issue or theory involved a pure question of law and/or the failure to consider it would result in a miscarriage of justice. *Kamen v. Kemper Financial Serv.*, 500 U.S. 90 (1991); *Singleton v. Wulff*, 428 U.S. 106-120-121 (1976); *Ford v. United States*, 989 F. 2d 450, 453 (11th Cir. 1993); *Daigle v. Shell Oil Co.*, 972 F. 2d 1527, 1539 (10th Cir. 1992); *United States v. Phelps*, 955 F. 2d 1258, 1265-66 (9th Cir. 1992); *Independent Insurance Agents v. Clarke*, 955 F. 2d 7312, 733-34 (D.C. Cir. 1991), *reversed on other grounds*, 508 U.S. 439 (1993);[10] *Mike Ousley*

[10] Interestly in that case, the Court rejected the petitioner's stance that it could not review a particular issue because the issue was not briefed until the Court of Appeals ordered supplemental briefing after oral argument.

Productions, Inc. v. WJBF-TV, 952 F. 2d 381, 383 (11th Cir. 1992); *Fane v. Edenfield*, 945 F. 2d 1515, 1519 n. 11 (11th Cir. 1991), *affirmed*, 507 U.S. 760 (1993); *McGinnis v. Ingram Equipment Co.*, 918 F. 2d 1491, 1495 (11th Cir. 1990); *Booth v. Hume Publishing Co.*, 902 F. 2d 925, 928 (11th Cir. 1990); *North Mississippi Communications, Inc. v. Jones*, 874 F. 2d 1064, 1068-69 (5th Cir. 1989); *United States v. Southern Fabricating Co., Inc.*, 764 F. 2d 780, 781 (11th Cir. 1985); *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F. 2d 355, 359-61 (11th Cir. 1984). "[W]hether the plaintiff has asserted a violation of a constitutional right at all . . . [is a] purely legal question. . . . " *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

Moreover, the Court of Appeals was not bound, nor was its discretion impaired or limited by the parties' stipulation on a pure question of law. *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993) ("[a]fter giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law"); *United States v. Burke*, 504 U.S. 229 (1992) (Scalia, J., concurring) (a court "need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it"); *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939) ("[w]e are not bound to accept, as controlling, stipulations as to questions of law"); *Swift & Co. v. Hocking Valley Railway Co.*, 243 U.S. 281, 289 (1917) ("[i]f the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by

agreement of counsel on a subsidiary question of law . . . [w]e treat the stipulation . . . as a nullity").

Similarly, any stipulation during the charge conference that Plaintiff suffered a constitutional deprivation is a nullity. There were no questions of fact as to what transpired during the course of this detestable incident. Therefore, the Court of Appeals acted well within the purview of its discretion when it considered the purely legal question as to whether Plaintiff did in fact suffer a constitutional violation – an essential element of his case.

The failure to consider whether Plaintiff suffered a constitutional violation at all would have resulted in a miscarriage of justice. Under the plain language of 42 U.S.C. §1983, the plaintiff must have suffered a constitutional violation – causally related to a custom, policy, or practice – that was executed under color of law, in order to establish municipal liability. Stated otherwise, there is no basis for municipal liability in the absence of a constitutional violation that is causally related to a custom, policy, or practice. Since Plaintiff herein suffered no constitutional violation as a matter of law, the district court should have directed a verdict in the City's favor (just as it did for the fire chief), and not submitted the case to the jury. It would be a travesty to sustain a liability determination for a civil rights violation based on a nonexistent constitutional violation.

CONCLUSION

Respondent, Defendant/Appellant below, City of Miami, respectfully requests the Court to **deny** the Petition for Writ of Certiorari.

Respectfully submitted,

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v.

CITY OF MIAMI, FLORIDA,
Defendant-Appellant,

Charles V. Boyd, Osvaldo Iglesias, Michael S. Whittington, Pedro Gomez, Charles K. McDermott, Colonel H. Duke, Defendants.

No. 93-4324.

United States Court of Appeals,
Eleventh Circuit.

Aug. 25, 1995.

Charles C. Mays, Asst. City Atty., Kathryn S. Pecko, Asst. City Atty., Miami, FL, for appellant.

Irving M. Miller, Susan Eisenberg, Miami, FL, for appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and KAUFMAN*, Senior District Judge.

TJOFLAT, Chief Judge:

The City of Miami (the "City") appeals a $1.3 million verdict based on liability under 42 U.S.C. section 1983. Herman Skinner, a fire fighter, sued the City for injuries he sustained from a hazing incident. Because Skinner is

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*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

unable to prove a violation of a right secured by the United States Constitution or federal law, we reverse the district court's denial of the City's motion for judgment as a matter of law.

I.

The facts giving rise to this lawsuit are not in dispute. Herman Skinner, Charles V. Boyd, Osvaldo Iglesias, Michael S. Whittington, Pedro Gomez, and Charles K. McDermott were fire fighters employed by the City of Miami. With the exception of Skinner, the fire fighters were assigned to Fire Station No. 3. Skinner, who was assigned to Fire Station No. 4, was temporarily assigned to Fire Station No. 3 on the morning of December 9, 1989, as he had been between five and ten times before. During those prior assignments, Skinner developed a sense of camaraderie with the other fire fighters, which included engaging in joking, singing, and wrestling. For example, Skinner once jokingly placed his arm around Iglesias' neck and told Iglesias that "he looked good, and that if the two were stranded on an island together, Skinner would make Iglesias his woman."

When Skinner reported to Station No. 3 on the morning of December 9, the other fire fighters were asleep. Charles Boyd warned Skinner that "if you don't get out of here with all this loud noise, we are going to get you when we wake up." The day proceeded uneventfully with several of the fire fighters discussing a local high-profile criminal trial and singing a song.

After the singing ended, while Skinner sat in a chair and watched television, Boyd and Iglesias, assisted by

McDermott and Whittington, approached him from behind and wrestled him to the floor. Handcuffs were applied to Skinner's wrists while he was on the floor. As Skinner was on the floor handcuffed, Boyd, who was naked, straddled Skinner's chest, grabbed Skinner's head, and rubbed his scrotum over the top of Skinner's head. Everyone present laughed except for Skinner, who demanded that the handcuffs be removed.

When the handcuffs were removed, Skinner chased Boyd. Skinner caught Boyd, but eventually walked back into the room holding Boyd's arm. Later, Skinner retaliated by grabbing Boyd's testicles causing Boyd to cry and scream. Three fire fighters eventually pulled Skinner away from Boyd. Skinner also attempted to bite Gomez's nipple and bent Iglesias' finger backwards.

On January 23, 1990, Skinner filed suit against the City of Miami, the Chief of the Fire Department (the "Chief") in his official capacity, and numerous fire fighters. Skinner asserted liability for violations of the Fifth and Fourteenth Amendments under section 1983 and pendent state law claims. On April 24, 1990, Skinner filed an amended complaint suing the City, the Chief in his individual and official capacities, and the fire fighters in their individual and official capacities, alleging violations of his Fourth, Fifth, and Fifteenth Amendment rights, as well as pendent state law claims. Specifically, Skinner alleged that the City "has a custom or policy of authorizing its fire fighters to engage in horseplay and hazing which exceeds the bounds of good taste and safety and is destructive to the morale of minority fire fighters and is so extreme that it violates certain rights secured to said persons by the constitution and laws of

the United States." Record, vol. 1, at 4, No. 29. Skinner alleged that the City's practices violated the Fourth, Fifth, and Fourteenth Amendments, which "prohibit the use of excessive and unreasonable force; prohibit the deprivation of liberty without due process of law; and provide freedom from summary punishment." Record, vol. 1, at 7-8, No. 29.

Discovery ensued, and the individual fire fighters filed a host of counterclaims. Skinner reached confidential cash settlements with the individual fire fighters prior to trial. The City and Chief moved for summary judgment contending that Skinner had not been subjected to injuries under color of law and that the City and Chief did not unconstitutionally train, supervise, and discipline fire fighters. The district court denied the motion. The case was tried for five days (December 21, 1992 through December 30, 1992) before a jury. At the close of plaintiff's case, the City and Chief moved for judgment as a matter of law on the bases that plaintiff failed to prove any custom, practice, or policy or that the fire fighters were acting under color of law. Record, vol. 8, at 40, No. 236. The district court granted the motion as to the Chief, in both his individual and official capacities, but denied it as to the City. The jury returned a verdict in the amount of $1.3 million. The district court denied the City's motions for judgment as a matter of law, and in the alternative, for a new trial, and entered final judgment. This appeal followed.

II.

Section 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. "[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2695 n. 3, 61 L.Ed.2d 433 (1979)). To succeed, a section 1983 plaintiff must show a violation of a right secured by federal law.

Skinner alleged in his amended complaint violations of the Fourth, Fifth, and Fourteenth Amendments. At oral argument, Skinner's counsel acknowledged that there had been no Fourth Amendment violation. We are left with a substantive due process claim.[1] The substantive element of the Due Process Clause protects those rights that are "fundamental" – rights that are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S.

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[1] The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). The Supreme Court has deemed that most, but not all, of the rights enumerated in the Bill of Rights are fundamental. Certain unenumerated rights, such as the right to privacy, also merit protection. *See, e.g., Planned Parenthood v. Casey*, ___ U.S. ___, ___, 112 S.Ct. 2791, 2807, 120 L.Ed.2d 674 (1992).

Although the Supreme Court has extended substantive due process protection to certain unenumerated rights, it has not extended Fourteenth Amendment coverage to many areas. Tort law is one such area that remains largely outside the scope of substantive due process jurisprudence. *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) (noting that the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society"); *Wright v. Lovin*, 32 F.3d 538, 540 (11th Cir.1994). "[S]ubstantive rights . . . created *only* by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights are created only by the Constitution.' " *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir.1994) (en banc) (emphasis added) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell, J., concurring)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995).

> [T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-

> ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (citation omitted). Skinner has proven that he was assaulted – that, however, is a tort created by state law, and not necessarily a violation of a constitutional right.[2] Skinner has failed to show a violation of any right secured by federal law either under the Constitution or a federal statute.

Skinner argues that we should not consider the issue of a constitutional violation because it was not raised by the City in the district court or on appeal. Minimal attention was paid to the issue of a constitutional violation in the district court.[3] Although as a general rule, an

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[2] The record does not support the dissent's implication that the City committed any deliberate acts to injure Skinner. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls short of demonstrating that the City violated a substantive constitutional right.

[3] This treatment is exemplified by the imprecise and scattered manner in which the district court instructed the jury on Skinner's constitutional claims:

> Plaintiff, Herman Skinner, has alleged that the defendant, the City of Miami, has deprived him of his constitutionally guaranteed right to be free from unreasonable seizures or physical abuse.
>
> You, the jury, are instructed that Title 42 U.S.C. Section 1983 provides a federal remedy for the deprivation of rights, privileges, or immunities

appellate court will not consider a legal issue or theory raised for the first time on appeal, *Lattimore v. Oman*

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secured by the Constitution or the law of the United States.

Instruction No. 8A, Record, Vol. 3, at 12, No. 180.

> In order to determine whether a plaintiff can recover from a defendant under 42 U.S.C. Section 1983 for deprivation of his constitutionally guaranteed rights to be free from unlawful seizure or physical abuse, you would have to determine whether such deprivation occurred. However, the parties have agreed that said seizure and physical abuse did occur.
>
> Specifically, Herman Skinner claims that five fire fighters while acting under color of authority of the State of Florida as members of the Fire and Rescue and Inspection Services Department of the City of Miami made an unprovoked attack upon Plaintiff in violation of his constitutional rights. It is alleged that these fire fighters intentionally violated Skinner's constitutional rights including the right to be free from the use of excessive and unreasonable force, physical abuse and the right not to be deprived of his liberty without due process of law. Plaintiff alleges that the City of Miami is liable for this constitutional deprivation because the actions of these fire fighters were permitted to occur because of customs, practices or policies of the City of Miami Fire Department which reflect a deliberate indifference to the rights of persons employed as fire fighters.

Instruction No. 8B, Record, Vol. 3, at 13, No. 180.

> In order to prove his claim, Herman Skinner must prove by a preponderance of the evidence each of the following facts:

Constr., 868 F.2d 437, 439 (11th Cir.1989) (per curiam), we have discretion to do so if the new issue or theory "involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice," *United States v. Southern Fabricating Co.*, 764 F.2d 780, 781 (11th Cir.1985) (per curiam) (quotation omitted). Whether a constitutional violation has occurred is a question of law and the refusal to consider it would result in a miscarriage of justice – especially when a $1.3 million verdict is at issue. The issue, moreover, was not ignored entirely during the proceedings below. When discussing proposed jury instructions, counsel for the City did object to proposed wording and acknowledged that "in order for [plaintiff] to have a [section] 1983 case, you [must] have a right that exists under the Federal constitution or [under a] Federal statute." Record, Vol. 8, at 301.

We have given the parties ample opportunity to be heard on the subject, both at oral argument and through supplemental briefing. At no time has Skinner been able to point to any authority demonstrating that he has suffered a constitutional deprivation as opposed to a state law tort. The cases he relies on arose in the custodial setting and are inapposite.[4] *See, e.g., Cannon v. Macon*

> 1) that the fire fighters intentionally committed acts which violated one or more of Skinner's constitutional rights previously mentioned. . . .

Instruction No. 8C, Record, Vol. 3, at 14, No. 180.

[4] At oral argument, Skinner relied on *MacDowell v. Manchester Fire Dep't*, 769 F.Supp. 40 (D.N.H.1990), for the proposition that a government employee owes a co-worker a *constitutional* duty not to engage in harassing behavior. Our review of that case does not support such a reading, nor could we find any case to support such a proposition.

County, 1 F.3d 1558 (11th Cir.1993); *Douthit v. Jones*, 619 F.2d 527 (5th Cir.1980).[5] We, therefore, must conclude that although Skinner was the victim of a state law tort, he has not shown a constitutional violation. Consequently, he is not entitled to relief under section 1983.

We REVERSE and REMAND this case to the district court for entry of judgment in accordance with the City's motion for judgment as a matter of law.

IT IS SO ORDERED.

FRANK A. KAUFMAN, Senior District Judge, dissenting:

Chief Judge Tjoflat cites to and quotes from *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). In *Collins*, Justice Stevens, after noting the difference between "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the City is responsible for that violation", 503 U.S. at 120, 112 S.Ct. at 1065-66, analyzed the first issue in terms of substantive due process and quoted from *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), (quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670-71, 88 L.Ed.2d 677 (1986)), that substantive due process is only violated when government involves itself in "abusing [its] power, or employing it as an instrument of oppression" or when "an omission can . . . properly be

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

characterized as . . . arbitrary or conscience-shocking, in a constitutional sense", rather than in the context of "a fairly typical state law tort claim." 503 U.S. at 126-28, 112 S.Ct. at 1069-70. That approach by Justice Stevens would appear fully in line with the standard in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), adopted in cases such as *McKinney v. Pate*, 20 F.3d 1550, 1556, n. 7 (11th Cir.1994), and *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500 (11th Cir.1985), *cert. denied*, 476 U.S. 1115, 106 S.Ct. 1970, 90 L.Ed.2d 654 (1986).[1] In *Gilmere* at 1500-01, Judge Vance quoted Judge Friendly's observations in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973):

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick took place in a prison setting. In the majority opinion, Judge Tjoflat distinguishes prison cases on the grounds that matters which arise in a custodial setting are hardly fully applicable in an employment,

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[1] But see the reservations as expressed by Judge Tjoflat's separate opinion, joined in by Judges Roney and Fay, in *Gilmere* at 1511, n. 21; see also *McKinney* at 1556, n. 7.

non-custodial setting of the type set forth in the within case. I fully agree. However, that does not mean that substantive due process provides no protection for persons in the position of Skinner in a state employment situation. Rather, the test set forth in *Collins*, which itself involved an employment relationship and not a custodial setting, still remains fully applicable in a case such as this case.

An examination of the record in this case discloses that Skinner presented considerable evidence showing a long standing custom and practice of unfettered hazing by fellow employees, on a number of occasions, including group attacks upon a single fire fighter who had been recently promoted or married, or the like. Such evidence includes incidents during which four or five fire fighters held a fire fighter selected as their victim, while one or more other fire fighters painted the genitals of the victim and other fire fighters looked on, having, in one or more instances, been alerted by announcement over the loudspeaker system within the firehouse that the event was about to take place. There was, in addition, evidence that such occurrences had become sufficiently traditional, to have caused special vocabulary to be developed. The so called "three man lift" were words used with regard to the type of occurrence described *supra*. The words "red assing" were employed generally to describe a certain form of hazing. The evidence also was rather specific concerning the knowledge of such practices held by the Chief of the Fire Department and by other responsible officials of that department and that such officials had, at most, ineffectually attempted to stop the practices. Such evidence falls within the standards adopted by the

Supreme Court in *Collins*, 503 U.S. at 126, 112 S.Ct. at 1069, of abuse of power, and actions which constitute oppressive behavior by superiors in permitting fellow employees to engage in the same, and also adds up to "conscience shocking" behavior exceeding the typical state law tort claim on behalf of one employee against one or more other employees of the State. Further, such practices were permitted to continue over a long period of time and fell beyond the single type of "push or shove" occurrence referred to by Judge Friendly in *Johnson v. Glick*, at 1033.[2] Nor do such practices constitute the kind of behavior which governmental officials may ignore without liability. See, by way of contrast, *Lovins v. Lee*, 53 F.3d 1208 (11th Cir.1995), in which governmental officials were held non-liable for rape by a violent criminal allegedly, wrongfully released on a temporary pass from prison.

In his majority opinion, the Chief Judge has written[3]: "The record does not support the dissent's implication that the City committed any deliberate acts to injure Skinner. At most, the evidence suggests that certain fire department officials knew that hazing incidents had occurred at some points in the past. This, however, falls

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[2] *MacDowell v. Manchester Fire Dep't.*, 769 F.Supp. 40 (D.N.H.1990), relied on by Skinner and discussed by Judge Tjoflat, *see* n. 3 of the majority opinion, may well have only involved such a single type of event; accordingly its authority may be questionable.

[3] See n. 2 of the majority opinion.

short of demonstrating that the City violated a substantive constitutional right". I respectfully disagree. A deliberate act to injure on the part of the City of Miami is not necessary to establish liability pursuant to § 1983. Rather, a municipality may be subject to § 1983 liability if plaintiff establishes "a widespread practice that, 'although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law,' (citations omitted). In other words, a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it." *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir.1991).[4] In the within case, there is quite a bit of

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[4] *See also Church v. City of Huntsville*, 30 F.3d 1332, 1345-1347 (11th Cir.1994); *Brooks v. Scheib*, 813 F.2d 1191, 1193 (11th Cir.1987) ("(a) municipality's failure to correct the constitutionally offensive actions of its police department may rise to the level of a 'custom or policy' if the municipality tacitly authorizes these actions or displays deliberate indifference towards the police misconduct (citations omitted))"; *Depew v. City of St. Mary's*, 787 F.2d 1496, 1499 (11th Cir.1986). Authority to the same effect also emanates from other Circuits; *see, e.g., McNabola v. Chicago Transit Authority*, 10 F.3d 501, 511 (7th Cir.1993) (quoting from the Eleventh Circuit's opinion in *Brown*); *Bordanaro v. McLeod*, 871 F.2d 1151, 1157 (1st Cir.), *cert. denied*, 493 U.S. 820, 110 S.Ct. 75, 107 L.Ed.2d 42 (1989); *Spell v. McDaniel*, 824 F.2d 1380, 1386-87 (4th Cir.1987), *cert. denied*, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988). Individual liability, as contrasted with liability pursuant to *Monell v. Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), can also stem from such omissions. *See Swint v. City of Wadley*, 51 F.3d 988, 999 (11th Cir.1995), involving an arrest, not an employment setting. But that distinction, as discussed *supra* in the body of this dissent, does not, in my view, adversely affect

evidence of just such a failure to stop a known, widespread practice, and also of the fact that there were scattered ineffectual attempts to curtail that practice. Those ineffectual attempts support the verdict of the jury in favor of the plaintiff – they do not undermine it.

In his majority opinion, Judge Tjoflat writes "[m]inimal attention was paid to the issue of a constitutional violation in the district court", and refers to the fact that the district court simply instructed the jury that Skinner had claimed denial of his "constitutionally guaranteed right to be free from unreasonable seizures or physical abuse." See n. 2 in the majority opinion, along with parts of the record setting forth the jury instructions relating to the roles played by responsible officials of the City of Miami. Certainly it would have been better for the trial judge to have utilized the standards enunciated by Justice Stevens in *Collins* and by Judge Friendly in *Johnson v. Glick*. But the record does not disclose that defendants-appellants specifically requested such instructions, or even, in general, requested the inclusion of the same in the jury instructions. Under the circumstances, it would appear that the jury instructions were not so lacking in compliance with applicable legal standards so as to require a new trial in order to avoid a miscarriage of justice.

That is particularly true in this case in which, from my point of view, there is more than ample evidence to sustain the jury's verdict and to support affirmative

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the application herein of a combination of the standards of *Collins* and *Monell* so as to require anything other than affirmance of the judgment below.

answers by the jury to the two discrete questions posed by *Collins*, namely that (1) "plaintiff's harm was caused by federal constitutional violation", and (2) "The City is responsible for that violation." *Collins*, 503 U.S. at 120, 112 S.Ct. at 1066.

For the reasons set forth in this separate opinion, I respectfully dissent and would affirm the judgment of the district court.

[p. 301] THE COURT: Pardon, okay.

MR. MAYS: The first paragraph, it says, "has a private or constitutional guaranteed right to be free from unreasonable seizures." That is a constitutional right, no problem with that. "Accompanied by degrading and humiliating embarrassment."

THE COURT: I put harassment.

MR. MAYS: Judge, there is nothing in the constitution, Baker versus McCullum, and the Court is familiar with that, Baker versus McCullum indicates and states quite clearly that 1983 protects Federally protected rights, and in order for it to have a 1983 case, you got to have a right that exists under the Federal constitution of the Federal statute. There is nothing in the Federal constitution that gives us a right to be free from harassment.

THE COURT: You are a strict constructionist. An original intent fellow.

MR. MAYS: I am a very liberal person from the standpoint of interpreting the United States constitution, but notwithstanding how liberal I can be, I can find nothing in that document that says you have a right to be free from harassment.

THE COURT: How about the Fourteenth Amendment?

MR. MAYS: The Fourteenth Amendment has different [p. 302] components. The Fourteenth Amendment has a life, liberty, property. Obviously we are not talking about life here. We are talking about a seizure that took place.

THE COURT: Liberty to be free to do things: Travel, work, not be handcuffed. We can go through all the details, not to have someone's private parts be placed on your head, things of that nature.

MR. MAYS: Board of Regents is [sic] versus Roth, the Court is familiar with that. The Supreme Court there said the liberty clause in the Federal Constitution is not so broad and encompassing so as to include everything that we think ought to be a constitutional right.

Hall versus Davis, United States Supreme Court said the same thing, the liberty clause and the liberty interests that the constitution protects is no [sic] so encompassing so as to include everything under the sun. Instead we have to be able to identify something specific here.

THE COURT: They have. You don't wanted [sic] me to write that in in the instruction, do you?

MR. MAYS: No, but we have to figure out what we are talking about. You have the right to be free from unreasonable seizures. That is true.

THE COURT: The handcuffing.

MR. MAYS: The handcuffing, and in addition thereto, the force that they used, which was placeing [sic] the scrotum on [p. 303] top of this man's head.

THE COURT: Okay, and how do I say that in jury instructions?

MR. MAYS: To be free from unreasonable seizures, what we are talking about is degrading and humiliating harassment.

THE COURT: That's what I was talking about.

MR. MAYS: Judge, we say that, we might as well give the jury a verdict.

THE COURT: I give them a form. I am going to give them a form.

MR. MAYS: But you might as well, if this language is in there to the jury instruction, then there is no reason for the jury to deliberate.

THE COURT: Why?

MR. MAYS: There is nothing in the federal constitution that would give them such a right.

THE COURT: What does the plaintiff want to say other than you probably disagree.

MS. EISENBERG: There needs to be further instruction, other than the unreasonable seizure, because there are other allegations that we have of violation under the Fourteenth Amendment.

THE COURT: I put that in, in another instruction.

Do you think if I just say "free from unreasonable [p. 304] seizures" period and give the other instructions that I propose to give, you are covered, right, you would not have any objection.

MS. EISENBERG: Yes, if we could take that language and move it into this instruction as well, the Fourteenth Amendment instruction, because –

THE COURT: Now say that again. You mean delete "accompanied by degrading and humiliating

harassment" as being duplicitous since I will give further instructions that you can tell that probably the defendant will object. So let me deal with one portion at a time.

MS. EISENBERG: Your Honor, if you are going to say in 8-A that deprive him of his constitutional guaranteed rights, and you are talking about unreasonable seizures, I think you also need to say "free from the use of excessive and unreasonable force."

THE COURT: How about if I just say "constitutionally guaranteed rights" period, since I explain all those rights later on.

Any problem from the plaintiff?

MS. EISENBERG: That is fine.

THE COURT: Any problem from the defendant?

MR. MAYS: Well, Judge.

THE COURT: Any objection if I just change "must have deprived him of his constitutional guaranteed rights" [p. 305] and then I will explain it later on.

MR. MAYS: Why don't we do this. Let's leave in "to be free from unreasonable seizures and physical abuse." That's what we are talking about, physical abuse.

THE COURT: Okay.

MR. MAYS: If you look at the Broward decision, Broward versus County of Inyo (phonetic), United States Supreme Court 1988 and the cases following that, if a situation does not violate the Fourth Amendment, then it

could indeed give rise to a violation of substantive due process.

THE COURT: By physical abuse.

MR. MAYS: By physical abuse.

MS. EISENBERG: Physical abuse is fine.

THE COURT: How about if we put "or physical abuse." That way there is an or.

MR. MAYS: Or physical abuse.

THE COURT: Okay.

Instruction No. 8B.

Any objection from the plaintiff?

MS. EISENBERG: Yes, Your Honor.

THE COURT: Okay. Where?

MS. EISENBERG: In the first paragraph, it indicates that you must first determine whether said seizure and harassment did occur. The parties have stipulated that [p. 306] the act did occur. Nobody is denying that and nobody is denying that the act violated his constitutional rights. It is part of the pretrial stipulation.

THE COURT: Let me ask Mr. Mays.

Do you agree or disagree?

MR. MAYS: She might be right, but the problem that I have with that is, I think she is right about that first portion of it, Judge, but the problem that I have is you have, we have got offending language in this again, "degrading and humiliating harassment."

THE COURT: Okay. Well, I can change it again to physical abuse.

MR. MAYS: Physical abuse.

THE COURT: And/or physical abuse, so I can change that, and then just eliminate "you must first determine whether said seizure and harassment did occur." Since there is a stipulation, should I instruct the jury on that?

MS. EISENBERG: Yes, the jury should be instructed.

MR. MAYS: Yes, let the jury know that I have agreed to that.

THE COURT: Okay. The parties have agreed.

MS. EISENBERG: That the seizure and physical abuse, if that is what you want to call it.

THE COURT: That seizure and physical abuse did occur, so there is a stipulation that Mr. Skinner's [p. 307] constitutional rights were violated?

MR. MAYS: Yes, Your Honor.

THE COURT: I ask a lot of tough questions, don't I, but I want you to, whatever the jury decides, I want to make it easy for those three wiser judges up there, whoever appeals, if there is an appeal.

Then we we [sic] should not ask the jury to make that determination.

Then, any objection to the second paragraph?

From the plaintiff?

MS. EISENBERG: No objection.

THE COURT: Okay. It sounds familiar, doesn't it.

From the defendant, any objection?

MR. MAYS: Yes, Your Honor.

In the middle of that paragraph you have included physical harassment. We need to change that harassment to abuse.

THE COURT: Okay.

MS. EISENBERG: No objection.

THE COURT: We will change that.

Other than that, there is no objection to instruction No. 8B on Page 13?

MR. MAYS: Except for the last sentence, Your Honor. It goes to deliberate indifference to the rights of persons employed as firefighters.

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